SIVAPERUMAN v. HEAH SEOK YEONG REALTY SDN. BHD.

[F.C. (Chang Min Tat F.J., Syed Othman F.J. and Abdoolcader J.) October 23, 1978]
[Ipoh — Federal Court Civil Appeal No. 115 of 1978]

Practice and Procedure — Injunction — Interim injunction — Mandatory injunction — Principles applicable — Exceptional circumstances — Balance of convenience — Industrial relations — Relief sought practically answers whole claim — Damages adequate remedy.

Industrial Law — Industrial disputes — Interference by court.

In this case the appellant's services as a mandore in an estate had been terminated by the respondents. The appellant took up the question of his dismissal and the matter was referred by the Minister to the Industrial Court as a trade dispute and the matter was still pending. In the meantime the respondents applied for, and obtained an interlocutory injunction to restrain the appellant until the trial of the action from remaining in the quarters occupied by him. The appellant appealed.

Held, allowing the appeal: (1) the interlocutory injunction although couched in prohibitory terms was in effect a mandatory injunction in substance and effect;

(2) an interim or interlocutory mandatory injunction would never be granted before trial save in exceptional and extremely rare cases;

(3) the interlocutory injunction in this case virtually gave to the respondents the full relief sought to be secured at the trial, as the respondents could not be said to be really concerned about their claim for damages against a labourer;

(4) in view of the case of the appellant's dismissal being pending before the Industrial Court which had jurisdiction to make an award *inter alia* for reinstatement or re-employment, the circumstances would be exceptional and a refusal of the interlocutory injunction would be justified on that ground alone;

(5) it was necessary for any plaintiff seeking interlocutory relief to show that there was at least a serious question to be tried and to adduce sufficiently precise factual evidence to satisfy the court that he had a real prospect of succeeding in his claim at the trial. In this case the respondents had not met this test as there was no factual evidence to point to a real prospect of success at the trial in view of the pending determination by the Industrial Court in relation to the appellant's employment;

(6) in this case damages would be an adequate remedy and the balance of convenience would be in favour of the appellant, as would be considerations of the maintenance of the *status quo* and greater hardship;

(7) it could only be in the most extreme circumstances that the court should interfere by way of mandatory injunction in the delicate mechanism of industrial disputes and industrial negotiations.

Cases referred to:

(1) *Shepherd Homes Ltd.* v. *Sandham* [1970] 3 W.L.R. 348, 359.
(2) *Hounslow Local Borough Council* v. *Twickenham Garden Developments Ltd.* [1970] 3 W.L.R. 538, 570-1.
(3) *Wah Loong (Jelapang) Tin Mine Sendirian Berhad* v. *Chai Nyen Yiok* [1975] 2 M.L.J. 109.
(4) *Woodford* v. *Smith* [1970] 1 W.L.R. 806.
(5) *Hill* v. *C.A. Parsons & Co. Ltd.* [1972] 1 Ch. 305.
(6) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396.
(7) *Fellowes & Son* v. *Fisher* [1976] Q.B. 122.
(8) *Hubbard* v. *Pitt* [1976] Q.B. 142.
(9) *In re Lord Cable deceased* [1977] 1 W.L.R. 7, 19.
(10) *Harold Stephen & Co. Ltd. & Ors.* v. *Post Office* [1978] 1 All E.R. 939, 944.

FEDERAL COURT.

A.I. Raj for the appellant.

H.R. Sankey for the respondents.

Chang Min Tat F.J.: I will ask Abdoolcader J. to deliver the first judgment.

Abdoolcader J. (delivering oral judgment): The appellant's employment as a mandore in Sungei Chinoh Estate was terminated by the respondents by his dismissal on June 16 last year. The appellant took up the question of his dismissal through his Union with the Minister of Labour who in turn on January 24 this year referred the matter under the provisions of section 26(2) of the Industrial Relations Act, 1967 to the Industrial Court as a trade dispute within the definition thereof in section 2 of the Act. This was fixed for hearing before the Industrial Court last month but was postponed as a result of some oversight on the part of the Union's solicitors.

In the meantime the appellant refused to vacate the quarters he occupied in the estate as a prerequisite of his employment despite requests by the respondents who accordingly commenced these proceedings for an injunction and damages, and then applied for and obtained an interlocutory injunction in effect for possession of the quarters pending trial, and that is now the subject-matter of this appeal before us.

I would make two observations on the interlocutory injunction that was sought and granted.

The first is that it is couched in prohibitory terms restraining the appellant until the trial of the suit from remaining in the quarters but it is in effect a mandatory injunction. Equity looks to the substance and intent and not to the form, and the interlocutory injunction sought and granted although prohibitory in language is mandatory in substance and effect (*Shepherd Homes Ltd.* v. *Sandham*[1] (at p. 359); *Hounslow Local Borough Council* v. *Twickenham Garden Developments Ltd.*[2] (at p. 570-1), and as I said in my judgment in *Wah Loong (Jelapang) Tin Mine Sendirian Berhad* v. *Chai Nyen Yiok*,[3] an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases.

The second is that the interlocutory injunction virtually gives to the respondents on their claim the full relief actually sought to be secured at the final hearing, as I do not seriously think the respondents are really concerned about their claim for damages against a labourer. As I said however in *Wah Loong*,[3] the court is not precluded from making such an order when the matter is viewed on a balance of convenience in the light of the principle enunciated in *Woodford* v. *Smith*.[4]

Turning now to the effect of the reference of the appellant's dismissal to the Industrial Court as a trade dispute in the light of the fact that the Industrial Court now has power to make an award for the reinstatement or re-employment of a workman, a serious inroad was made in November 1971 into the general rule that the court will not decree specific performance of a contract of personal relationship or service by the decision of the Court of Appeal in England in *Hill* v. *C.A. Parsons & Co. Ltd.*[5] which appears to me to

be very pertinent and useful for the purposes of this appeal.

In *Hill*,[5] the defendant company agreed with a trade union that after a period of 12 months it should be a condition of service for their technical staff to be members of the union. The plaintiff was an engineer employed by the defendants since 1936. He had recently joined another union of professional engineers. By letter of May 19, 1971, the defendants gave the plaintiff one month's notice of a change of his conditions of employment whereby he was required to become a member of the union. He did not join the union, and by letter of July 30, 1971, the defendants gave the plaintiff and thirty-seven other professional employees a month's notice of termination of employment. The plaintiff was then aged 63, earning a salary of £3,000 a year and he was due to retire in two years' time. By writ of August 13, 1971, he claimed an injunction restraining the defendants from implementing their notice to him of July 30 purporting to terminate his employment. On the plaintiff's motion for an interlocutory injunction, Brightman J., held that he had no power to grant such relief.

The Court of Appeal by a majority reversed that decision, allowed the appeal and held that since the plaintiff was entitled to at least six months' notice, the defendants' notice of July 30, which he had not accepted, was invalid, and that in the exceptional circumstances of the parties' relationship and the plaintiff's likely protection by the coming into operation of Part II of the Industrial Relations Act, 1971 before a fresh notice could take effect, his contract of employment was still subsisting and, damages not being at all an adequate remedy, he was entitled to the interim injunction sought.

In view of the case of the appellant's dismissal pending before the Industrial Court which has jurisdiction to make an award *inter alia* for reinstatement or re-employment, the circumstances would in my view be exceptional within the principle and *raison d'etre* of *Hill*[5] and a refusal of the interlocutory injunction sought by the respondents would be justified on that score alone although this would in effect be tantamount to treating the relationship of master and servant, although terminated, as still subsisting and thus appear to breach the general rule.

The principles governing interlocutory injunctions are dealt with in my judgment in *Wah Loong*,[3] and the case invariably referred to these days in this regard is the decision of the House of Lords in *American Cyanamid Co.* v. *Ethicon Ltd.*[6]

I think the basic principles in *American Cyanamid*[6] can be aptly put thus: In order to be able to grant an interlocutory injunction, the court does not have to be satisfied that if the case went to trial on no other evidence than is before the court on the hearing of the application for interlocutory relief, the plaintiff would be entitled to a permanent injunction in the same terms as that sought in the interlocutory proceedings. Where damages would be an adequate remedy, no interlocutory injunction should normally be granted, but if there is doubt as to the adequacy of damages, the question of the balance of convenience arises, and although it might not be improper to take into account, as one of the many varying factors relevant to this question, the relative strength of each party's case, this should be done only on the basis of facts disclosed by the affidavit evidence as to which there is no credible dispute, without embarking on anything resembling a trial of the action. When an interlocutory injunction is sought, the balance of convenience will be the overriding consideration.

American Cyanamid[6] has been discussed and applied in a number of cases such as *Fellowes & Son* v. *Fisher*[7] and *Hubbard* v. *Pitt*,[8] and the position as formulated by these cases has been felicitously put by Slade J., in *In re Lord Cable, decd.*[9] (at p. 19) to this effect, that it is necessary for any plaintiff seeking interlocutory relief to show that there is at least a serious question to be tried and to adduce sufficiently precise factual evidence to satisfy the court that he has a real prospect of succeeding in his claim at the trial.

I cannot see from the affidavits filed that the respondents have met this test. There is no precise factual evidence to point to a real prospect of success at the trial in view of the pending determination by the Industrial Court in relation to the appellant's employment. Mr. Sankey for the respondents submits that reinstatement is only one of the many reliefs the Industrial Court can award and that it does not necessarily have to order reinstatement of the appellant, but as Slade J., said in *In re Lord Cable, decd.*[9] (at p. 19):

> "If the facts adduced by him in support of his motion do not by themselves suffice to satisfy the court as to this, he cannot in my judgment expect it to assist him by inventing hypotheses of fact upon which he might have a real prospect of success."

Even ventilating the other factors specified in the principles enunciated, I am of the view that damages would be an adequate remedy in the circumstances of this case, and there is indeed a claim by the respondents for damages in these proceedings. The balance of convenience is in favour of the appellant as the effect of the interlocutory injunction would be to pluck and dislodge him from his living accommodation while the determination of the question of his dismissal is pending before the Industrial Court. These considerations apply equally to the questions of the maintenance of the *status quo* and greater hardship. I cannot see how it can be said that the appellant's continued occupation of the quarters for the time being has caused irreparable damage to the respondents as they aver, as on uncontroverted affidavit evidence there are many other vacant quarters in the estate, and there cannot therefore be any necessity for immediate protection.

I have earlier pointed out that the interlocutory injunction granted is mandatory in effect and substance and the dismissal of the appellant has been referred to and is pending before the Industrial Court as a trade dispute. In *Harold Stephen & Co. Ltd. & Ors.* v. *Post Office*,[10] a decision of the Court of Appeal in England in July last year, Geoffrey Lane L.J. said (at p. 944):

> "Finally, and most seriously as I see it, the ground on which I would primarily base my decision would be this. It can only be in very rare circumstances and in the most extreme circumstances that this court should interfere by way of

mandatory injunction in the delicate mechanism of industrial disputes and industrial negotiations."

In the light of all that I have discussed it would seem that the interlocutory injunction should not have been granted in this case.

In the circumstances I would allow the appeal with costs here and in the court below and set aside the injunction.

Chang Min Tat, F.J.: I agree for the reasons stated by my brother Abdoolcader J., that the appeal should be allowed.

Syed Othman F.J.: I too agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Kean Chye & Sivalingam; H.R. Sonkey & Co.*

THE "DONG MOON" TRANS ASIA SHIPPING CO. LTD. v. "DONG MOON" OWNERS & ORS.

[O.C.J. (Arulanandom J.) October 3, 11, 1977 and February 3, 1978]

[Penang — Admiralty Suit No. 6 of 1977]

Shipping — Arrest of vessel — Application to set aside — Unconditional appearance — Agreement to refer disputes to arbitration — Stay of proceedings — Order for release of vessel — Arbitration Act, 1952, s. 6.

Practice and Procedure — Arbitration — Agreement to refer disputes to arbitration — Stay of proceedings — Arbitration Act, 1952, s. 6.

In this case the defendants had let the ship to the plaintiffs and the plaintiffs claimed that the defendants were indebted to them for hire advances, supply of guards, services and disbursements in respect of the ship. The plaintiffs caused the ship to be arrested in Penang. The defendants applied for orders that the writ of summons be set aside or stayed and that the vessel be released. They claimed that they were not indebted as claimed to the plaintiffs and that there was an arbitration clause in the time charterparty. The plaintiffs resisted the application on a preliminary objection that unconditional appearance had been entered.

Held: (1) the fact that the defendants had entered an unconditional appearance did not preclude the court's right to entertain the application and make such order as it thinks fit;

(2) it was not disputed that it had been agreed between the parties that all disputes should be referred to arbitration and in the circumstances stay of proceedings should be granted to the defendants;

(3) as stay of proceedings had been granted the ship should be released.

Cases referred to:-

(1) *Wilkinson* v. *Barking Corporation* [1948] 1 All E.R. 564, 567; [1948] 1 K.B. 721.

(2) *Ive & Baker* v. *William* [1894] 2 Ch. D. 478.

(3) *The "Golden Trader"* [1974] 1 Lloyds Report 383.

(4) *The "Beauty Orchid II"* [1977] 2 M.L.J. 83, 84.

ADMIRALTY SUIT.

N.T. Vello for the defendants/applicants.

V. Thevendran for the plaintiffs/respondents.

Cur. Adv. Vult.

Arulanandom J.: This was an application by motion by counsel on behalf of the defendants for the following orders:—

(a) That the Writ of Summons and all subsequent proceedings herein be set aside and/or stayed on the ground that the arrest of the vessel herein was unlawful and is an abuse of the process of this Honourable Court.

(b) Alternatively that all further proceedings herein be set aside and/or stayed on the ground that the maintenance of the arrest of the said vessel is unlawful.

(c) Alternatively that all further proceedings herein be stayed pursuant to the provisions of the Arbitration Act 1962 in particular section 6 thereof, and clause 17 of the charterparty dated May 25, 1976 made between the plaintiffs and the defendants in which they expressly agreed to refer to arbitrate the matter in respect of which this action is commenced.

(d) Such further or other relief as this Honourable Court deems just.

(e) That the costs of and incidental of this motion be provided for.

The application was supported by the affidavit of one Bae Chun Yong the shipping manager of the defendant company the owners of the ship "Dong Moon" and also the ship "Dong Moon No. 3".

The brief history of the matter was that by a time charterparty dated May 25, 1976 the defendants as owners of the ship "Dong Moon No. 3" (hereinafter referred to as "the said ship") had let the said ship to the plaintiffs for a period of twelve months with an option for about a month more or less to the charterer and for stated consideration in the charterparty.

On September 6, 1977, the plaintiffs caused the ship or vessel "Dong Moon" to be arrested in the Port of Penang. The plaintiffs alleged that the defendants were and are indebted to them in the sum of US$89,951.27 alleged to be for charterhire advances, supply of goods, services and disbursements in respect of the ship or vessel "Dong Moon No. 3" which is a sister ship of the ship or vessel "Dong Moon", the said debt being alleged to have been incurred between the dates April 28, 1976 and August 24, 1977.

The defendants disputed the plaintiffs' claim and in the affidavit in support of this application it appears from the plaintiffs' statement of accounts that while the plaintiffs alleged in their affidavit leading to the warrant of arrest of "Dong Moon" that the amount of US$89,951.27 related only to the "Dong Moon No. 3", in fact the sum of US$35,706.12 related to Dong Moon and the sum of US$40,981.60 related to Dong Moon No. 3. Furthermore by a general statement of accounts of the defendants there is a credit balance in the hands of the plaintiffs of the amount of US$47.79.

Furthermore, while on September 6, 1977, the plaintiffs arrested the "Dong Moon" in Penang on the grounds that the defendants were indebted to them in the sum of US$89,951.27, at the same time they made a demand of US$30,000 from the defendants in Korea for release of the ship in Penang and a further $19,000 when the ship arrived in Singapore. It must be noted that the difference in the sums is not negligible.